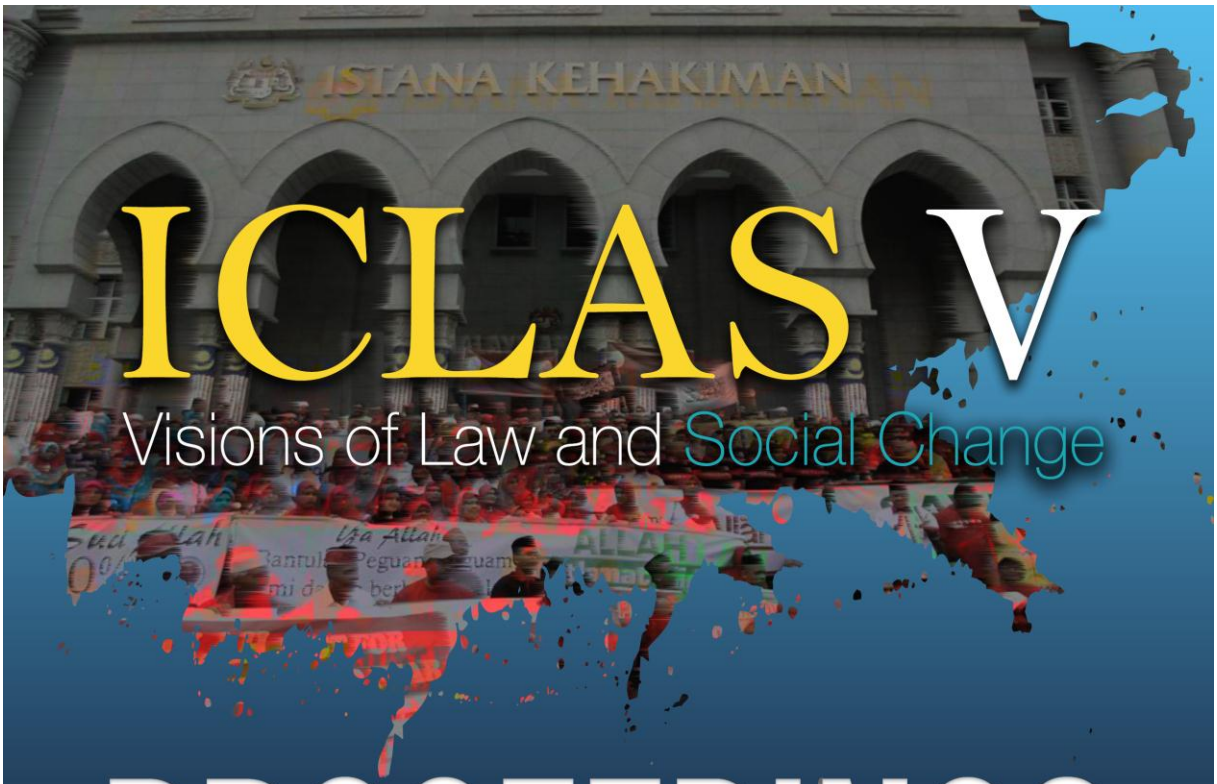

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CONSTITUTIONAL DEMOCRACY AND ADJUDICATION: A COMPARISON OF CONSTITUTIONAL ADJUDICATION INSTITUTIONS IN MALAYSIA AND INDONESIA

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Abstract

The experience of some countries shows that parliamentary sovereignty creates problems of hegemony of majority which has the potential to ignore minority. One of democratic responses to the evil of the majority is the emergence of the concept of constitutional democracy. The tyranny of majority against the rights of the minority is warded off by constitutional safeguards enforced primarily by the court. This is one of the reasons why Malaysia and Indonesia adopt the doctrine of constitutional supremacy when they achieved independence in 1957 and in 1945 respectively. In spite of close proximity in terms of territory and sharing cultural and historical heritages the two countries have fundamental structural constitutional differences. This paper aims at comparing constitutional adjudication as one of the mechanisms of constitutional democracy in both countries. The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realizing the goal of the rule of law state and democracy. The courts have the objectives of striving for a dignified life of the nations, and perform as actors of exercising judicial review. The courts in both countries play the role as check and balance mechanisms of the main organs in their constitutional and political systems. Each country has a different model of constitutional adjudication. Malaysia follows the common law

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model which functions the superior courts as organs of the constitutional adjudications, while Indonesia follows kelsenian model by establishing a separate new court, namely the Constitutional Court. This paper intends to observe the establishment, role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy within the two countries, (but also influenced) the process of democratic consolidation in the region.

Keywords: constitution, constitutional adjudication, constitutional court, democracy

1. Introduction

Throughout the history of mankind, the idea of higher and more fundamental law to which all acts of the state must conform has had long tradition. With the emergence of written constitutions in the modern era, the constitution was understood to be the embodiment of such higher and more fundamental law. This provided the theoretical basis for the system of constitutional adjudication which allows for the overruling of operations of the state that do not conform to the constitution.[855] The experience in particular countries shows that parliamentary sovereignty also create problem of hegemony of majority which has potentiality to ignore minority. Therefore, the concept of constitutional democracy emerged to control the tyranny of majority.

Malaysia and Indonesia adopted the doctrine of constitutional democracy since they declared their independence in 1957 and in 1945. This doctrine emphasizes that parliament as the representative of the will of people is subjected to the supremacy of the constitution as the supreme law of the nation.The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realizing the concept of constitutional democracy state.

Among the countries of Asia, Korea in 1988 became the first to adopt the system of a specialized constitutional court. In 1990s, many others followed suit: the Central Asian states of

[855]Annual Report, Twenty Years of Constitutional Court of Korea, 2008, at 65.

Uzbekistan, Kazakhstan, Kyrgyzstan as well as Mongolia and Thailand all established constitutional courts. [856] Since the political revolution of 1989, the Central and Eastern European states have embraced judicial review as a means of promoting the supremacy of constitutional values and protecting fundamental rights. Nearly all Central and Eastern European nations have established constitutional courts modeled after the constitutional courts in Western Europe. [857]After the fall of the Soviet Union, for instance, newly democratizing states in Eastern Europe such as Hungary, Romania, Bulgaria, Slovenia, Lithuania, Slovakia, Albania, the Czech Republic, and Russia opted for this system as they drew up new constitutions.[858] In Africa, a constitutional court was established in South Africa after its constitutional revision in 1996. Similarly, in Latin America, Colombia and Chile have established constitutional courts.[859]

In August 2003 Indonesia also established its constitutional court as the result of the Amendment of 1945 Constitution. The emergence of the constitutional courts in Indonesia was the resultant of political reform and judicial history of the country.Meanwhile, Malaysia functions the superior courts as institutions which faciliate the citizen to bring constitutional adjudication to the courts. This paper will elaborate the establisment, the role and the power of the constitutional adjudication institution in both countries. To deepen the description, the paper will compare the constitutional adjudication in both countries.

2. Constitutional Democracy and Constitutional Adjudication

Historically, constitutional adjudication is much older and more deeply entrenched in the United States than in Europe. Judicial review as a part of constitutional issues has been implemented continuously in the United States since the Supreme Court's landmark decision in *Marbury v. Madison,* 5 U.S. 137 (1803). While constitutional review in Europe, however, is

[856]The Kazakhstan later replaced "constitutional court" with "a constitutional council".
[857]Sarah Wrights Sheive, "Central and Eastern Europe Constitutional Courts and Anti-Majoritarian Objection to Judicial Review", (June, 1995) *Law and Policy in International Business*.
[858]Annual Report, 20 Years of Constitutional Court of Korea, 2008, at 66.
[859]Ibid.

largely a post–World War II phenomenon.[860]In pre-World War II in Europe, democratic constitutions could typically be revised at the discretion of the legislature.They prohibited review of the legality of statutes by the judiciary and they did not contain substantive constraints, such as rights, on the legislative authority. The rule of legislative supremacy meant that conflicts between a statute and a constitutional norm were to be either ignored by judges, or resolved in favor of the former.[861] One of the remarkable political developments of the twentieth century has been the development of constitutional democracy in Europe after World War II. The defeated powers in the western part of continent adopted new constitutions that embrace notions of individual rights and limited government.[862] In other words, since the end of World War II, 'a new constitutionalism' has emerged and widely diffused. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional courts have been charged with ensuring the normative superiority of the constitution. Such courts have been established in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltic's, and several states of the former Yugoslavia.[863]

3. The Conceptual Ground of Constitutional Adjudication

Kelsenderives the origins of judicial power to review legislation from argument of constitution as the supreme law of a country. He emphasizes that the supremacy is not real unless there is review. Without review, the constitution is not truly binding.[864] Troper also argues that constitution is a supreme as positive law and to safeguard the supremacy of constitution, it

[860]See Michel Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast", No 4 (2004) *International Journal of Constitutional Law*. See also Anna Gamper, "the Justifiability and Persuasiveness of Constitutional Comparison in Constitutional Adjudication", Vol.3, No. 3 (2009) *Online International Journal of Constitutional Law*,at 154.
[861] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, 2000, at 31.
[862] John Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lesson from Europe", Vol. 82, No. 7, (2004), *Texas Law Review*, at 1.
[863]Alec Stone Sweet,n. 9, at 31.
[864] See Michel Troper,"The Logic of Justification of Judicial Review"(2003) *International Journal of Constitutional Law*.

necessitates review.[865] In his conclusion, Tremblay stated that the supremacy of the Constitution entails judicial supremacy. The courts determine the constitutional standards and examine whether the regimes can meet the standards.[866] Judicial Review is justified for its role in correcting 'malfunctions' in democratic government that entrench the powerful or disregard minorities.[867] Lord Woolf also states that judicial review needs to be set in the context of mechanism which seeks to achieve broader political accountability.[868] The bases of constitutional adjudication in democratic countriesare as follows:

3.1 Constitutional Adjudication as Insurance

The conventional move to solve the problem of courts in democratic theory is to celebrate the role of judicial review in democracy as a check on majority power. Judicial power in this view can facilitate the democratic process by clearing out obstacles to its advancement. Such obstacles can emerge, for example, through majority impositions on the electoral process: It may be in the narrow self-interest of permanent majorities to disenfranchise political minorities, who then have no recourse through ordinary legislative processes. In such instance of systemic failure, the courts can clear the channels of the political process by striking statutes. By serving as a counter-majoritarian institution, judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself.[869] In other words, constitutional adjudication can perform as the protector of minorities' interests from hegemony of majority in the legislation process.

[865] Ibid.
[866] Luc B. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures" (2005), *International Journal of Constitutional Law.*
[867] See Adrienne Stone, "Democratic objections to Structural Judicial Review and the Judicial Role in Constitutional Law" (2010, Winter),*University of Toronto Law Journal*. See also further, John Hurt Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, 1981, at 102-4.
[868] See further Lord Woolf and et al, *De Smith's Judicial Review*, Sweet and Maxwell, 2007, at 6. In this book, the writers further explain that in some cases, the courts have regarded Parliament's ability to call ministers to account for their decisions as a reason to be wary of intervening to scrutinize the lawfulness of an impugned action or omission, or at least as a fact shaping the development of the common law.
[869] Ibid, at 21-22.

Judicial review can be a part of effective insurance in warning the politicians to perform his duty as the representative of people, to guarantee the fundamental rights of citizens and to work checks and balances mechanism between the judiciary and parliament. Having this function, judicial review can be considered as an important vehicle to maintain the quality of democracy in the light of the spirit of the constitution as the supreme consensus of the nation.

3.2 Constitutional Adjudication as State Mediator or Facilitator

The existence of the Constitutional Court could be understood from two aspects, namely political aspect and legal aspect. From the political aspect, the Constitutional Court is an effort to construct checks and balances mechanism among state institutions in the light of principle of democracy. This is in line with the powers of the Constitutional Court which has authority to review acts enacted by parliament and also decide disputes among state institutions.[870] Parliament sometimes enacts laws which lead conflicts among state institutions. Therefore, through its authority, the constitutional court may settle the disputes among state institutions. Democracy, in theory and practice, is based on principle of majority rules. However, this principle could be also a threat for democracy because majority also has potentiality to abuse powers if it is not controlled or limited. Therefore, it should be a rational limitation to guarantee the working of democracy itself. In this sense, judicial review-through the Constitutional Court is one of mechanism to overcome the weakness of traditional democracy.[871]

The development of modern states in a few decades has prompted complexity of the concept of separation of powers. This situation could create conflicts among state institutions. Hence, the Constitutional Court, through its powers, has important role in settling the disputes among the state institutions.[872] By having this authority, the court may perform significant role in ensuring the working of effective democracy.

[870]Muchammad Ali Safa'at, "Peran MK MewujudkanPrinsipChecks and Balances", *MajalahKonstitusi*, No.54, July, 2011, at 24.
[871] Ibid.
[872] Ibid.

3.3 Constitutional Courts as Strategic Actors

The development of constitutional review has transformed the role of and the function of the law courts, a development that some European legal scholars refer to as 'the constitutionalization of the law', or the 'constitutionalization of the legal order'. Sweet further asserted that by constitutionalization, (1) constitutional norms come to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges to resolve legal disputes, and (2) the techniques of constitutional decision-making become an important mode of argumentation and decision-making in the judicial system.[873]

This study is drawn on positive theories of courts and law that see the law as the product of interactions among various political institutions. Courts are assumed to maximize their substantive values and in doing so can be considered rational institutions in the broad sense of attempting to reach their goals. However, courts are not the only law-making institutions in a political system, so their ability to achieve particular outcomes is in part dependent on the preferences of other actors. For example, a legislature can overrule a judicial interpretation of a particular statute by passing a subsequent statute. In some systems, there exists a special procedure by which the court's constitutional decisions may be reviewed by other branches of government. Executive agencies can refuse to implement judicial decisions. Political branches can also affect judicial decisions through the appointment process. Through these various mechanisms of interaction with political actors, courts participate in constitutional "dialogues" with other forces, dialogues that create a shared understanding of what the constitution says over time.[874] In simple words, it may state the court could be a part of important actors in the political dialogues with other political branches in the light of finding the true meaning of the constitution.

An old proverb says that when elephants fight, the grass gets trampled and so is it with political conflict and democracy. When a political conflict becomes severe, democracy can be trampled by political institutions run amok. By transforming a political conflict into constitutional dialogues, courts can reduce the threat to democracy and allow it to grow. To play

[873] Alec Stone Sweet, n.9, at 114.
[874] Tom Ginsburg,*Judicial Review in New Democracies-Constitutional Courts in Asian Cases*, Cambridge University Press, 2003, at 67.

this important role of contributing to democratic stability and deliberation, courts must develop their own power over time. [875] Accordingly, to ensure the quality of the courts in function its role in balancing the powers in the political dialogues, independency and impartiality of the courts should be preserved.

4. The Constitutional Democracy and Constitutional Adjudication in Malaysia

The doctrine of separation of powers involved a system of "check and balance". Each branch of government is given specific powers of oversight (check) over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a balance of power between the three arms of government. This helps to prevent one branch of government from usurping power or taking over functions from the other branches of government. In *LohKooiChoon V Govt. of Malaysia*[876] it is stated that:

> "The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that … no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government."

Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the insconistency, be void". Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary.

The judiciary exercises the potent power of judicial review. Judicial review has been described as 'the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice'. The court has the power to strike down the law, to overturn the executive act/decision, or order a public official to

[875] Ibid, at 247.
[876] [1977] 2 MLJ 187.

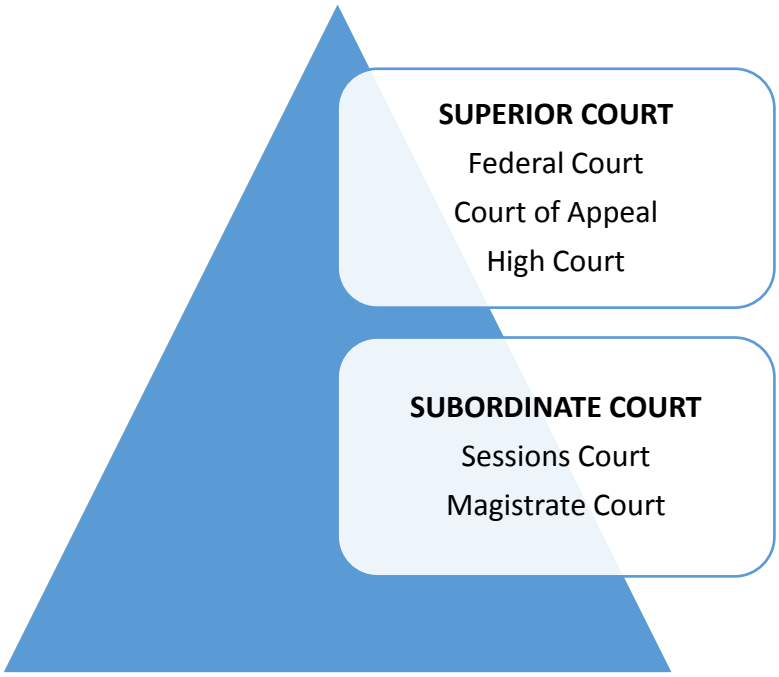
act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law in a free and democratic society.

4.1 The Framework of Consitutional Adjudication

The system of the Government in Malaysia is closely modelled on that of Westminster Parliamentary system with its own peculiarities. Malaysia has a written Constitution that spells out the function of the three branches of the Government namely; the Executive, Legislative and Judiciary. Article 39 of the Federal Constitution vested the executive authority of the Federation in the YDPA and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation in a Parliament. Article 121 deals with the judicial power of the federation. Judicial Review is an important tool for the judiciary's exercise of check and balance on the Legislature and the Executive.

4.2 The Powers of the Superior Courts

The judicial power of the Federation is contained in Part IX of the Constitution. In the hierarchy of courts; we have the subordinate courts which comprise of the Sessions Court and Magistrates Court and the superior courts which comprise of the High Court, Court of Appeal and the Federal Court.



The Federal Court of Malaysia is the highest judicial authority and the final court of appeal in Malaysia. The country, although federally constituted, has a single-structured judicial system consisting of two parts - the superior courts and the subordinate courts. The subordinate courts are the Magistrate Courts and the Sessions Courts whilst the superior courts are the two High Courts of co-ordinate jurisdiction and status, one for Peninsular Malaysia and the other for the States of Sabah and Sarawak, the Court of Appeal and the Federal Court.

The Federal Court, earlier known as the Supreme Court and renamed the Federal Court vide Act A885 effective from June 24, 1994, stands at the apex of this pyramid. Before January 1, 1985, the Federal Court was the highest court in the country but its decisions were further appealable to the Privy Council in London. However on January 1, 1978, Privy Council appeals in criminal and constitutional matters were abolished and on January 1, 1985, all other appeals i.e. civil appeals except those filed before that date were abolished.

The setting up of the Court of Appeal on June 24, 1994 after the Federal Constitution was amended vide Act A885 provides litigants one more opportunity to appeal. Alternatively it can

be said that the right of appeal to the Privy Council is restored, albeit in the form of the Federal Court.

In Malaysia we do not have a Constitutional Court. Most constitutional cases begin at the High Court. In certain circumstances constitutional cases is heard only by the Federal Court. Section 20 of the Courts of the Judicature Act deals with reference of constitutional question by subordinate court to the High Court. Section 30 provides 'Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court'. Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen. Section 84 of the Courts of the Judicature Act which deals with reference of constitutional question by High Court to the Federal Court states that 'where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(a) The Federal Court
The Federal Court hears appeals from the Court of Appeal.

|

(b) The Court of Appeal
The Court of Appeal hears appeals from the High Court relating to both civil and criminal matters.

|

(c) The High Court

A) CIVIL JURISDICTION	B) CRIMINAL JURISDICTION	C) APPELLATE JURISDICTION
The High Court has jurisdiction to try all civil matters but generally confines itself to matters on which the Magistrates and Sessions Courts have no jurisdiction. These include matters relating to divorce and matrimonial cases, appointment of guardians of infants, the granting of probate of wills and testaments and letters of administration of the estate of deceased persons, bankruptcy and other civil claims where the amount in dispute exceeds RM1,000,000.	The High Court may hear all matters but generally confines itself to offences on which the Magistrates and Sessions Courts have no jurisdiction, for instance, offences which carry the death penalty.	The High Court may hear appeals from the Magistrates and Sessions Courts in both civil and criminal matters. Amount in dispute in any civil matters must exceed RM10,000 except where it involves a question of law.

The superior courts have the jurisdiction to hear constitutional cases. Of all courts, the decision of the Federal Court is the most important because it is the highest court of the land. Being the court at the apex of the hierarchy in the common law system of Malaysia the Federal Court plays a dual role; as the most authoritative interpreter of the Constitution and also as the highest appellate tribunal relating to all matters including constitutional matters. Therefore, the Federal Court can be regarded as the constitutional court of the country. Being so, it plays a pivotal role in the defence of fundamental liberties as provided in Part ll of the Constitution.

The jurisdiction of the Federal Court is spelt out in Article 128. It has an exclusive jurisdiction in regard to:

[a] any question whether law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case maybe, the Legislature of the State has no power to make laws; and

[b] disputes on any other question between States or between Federation and any States.

It also has jurisdiction to determine any question as to the effect of any provision of the Constitution referred to it by the lower court and to remit the same to the other court to be disposed off in accordance with the determination.

The Federal Court is also conferred the advisory jurisdiction under Article 130 of the Constitution under which the Yang Di-PertuanAgong may refer to the Federal Court any question as to the effect of any provision of the constitution which has arisen or appear to him likely to arise. His Majesty has done so only once in *The Government of Malaysia v. Government of the State of Kelantan31968] 1 MLJ 129*.

4.2.1 Review of Primary Legislation / Check on the Legislature

Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the insconistency, be void". Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary.

The court in Malaysia can declare invalid legislation enacted by the Federal Parliament or the legislature of a State. The Federal Court in *Ah Thian v. Govt. of Malaysia*[877] had explained the legal position as quoted below:

> "The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or

[877] [1976] 2MLJ 112.

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The Court has power to declare any Federal or State law invalid on any of the above three grounds.

The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, cl (3) of article 4 provides that the validity of any law made by Parliamentor by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:-

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, cl (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a Judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, cl (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other Court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest Court in land."

As explained above the procedure and power to declare law made by the legislature invalid based on *ultra vires* are stated in art. 4(3) and (4) which need to be read together with article 128(1).

4.2.2 Review of Action and Decision / Check on the Executive

The Courts are the only recourse for the individual against any state abuse or misuse of power. Chief Justice Hidayatullah of the Indian Supreme Court called the Judiciary '*the upholders of the rule of law*' and '*the best protection against the despotism of the people's representatives*'.[878] The Court's exercise of control over the executive is mainly through the issue of the prerogative writs. In a lecture titled 'Misuse of Power' Lord Denning said:

In order to ensure this recourse (i.e. to law), it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of powers from whatever quarter it may come. No matter who it is - who is guilty of the abuse or misuse. Be it government, national or local. Be it trade unions. Be it the press. Be it management. Be it labour. Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else,

[878] M. Hidayatullah, *AJudge's Miscellany* (First Series) (Tripathi, 1927) p. 98.

the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy.[879]

The safeguards provided to the individual against encroachment of his rights and privacy by the Executive. The task in ensuring that government keeps itself within the law and not act arbitrarily towards its citizens is chiefly the task of the Courts. Lord Diplock described it as '*a first priority in the preservation of the rule of law and the maintenance of the quality of life in a democratic society*.'[880]

Administrative law and judicial review are indivisible aspects of the concept of rule of law. Its importance lies in maintaining the balance between state rights and rights of the individual. In this context, Lord Hewart described the rule of law as '*the predominance of law, as opposed to mere arbitrariness, in determining or disposing of the rights of individuals*'.[881]

Judicial review enables a person aggrieved by an administrative decision or action to seek review by a court of the lawfulness of that decision. Judicial review is brought before a court, and the court determines whether the decision complained about is unlawful and of no effect. The court then exercises its discretion regarding whether or not to grant relief. The court has no power to review the decision "on its merits" and determine whether or not it was the decision the court would have made. The court only has the power to review the decision to see whether the decision-maker made the decision lawfully.

Judicial reviewis the process by which the High Court exercises its supervisory jurisdiction over the decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged under statute to perform public acts and duties. This jurisdiction evolved in common law and was exercised by the issue of the prerogative writs of mandamus, certiorari and prohibitions. They are now regulated by statute namely Paragraph 1 of the Schedule to the Courts of Judicature Act, 1964 and procedurally by rules of Court, that is Order 53 of the Rules of the High Court, 1980.

[879] Lord Denning, *Misuse of Power*, The 1980 Richard Dimbleby Lecture (British Broadcasting Corporation) p. 5.
[880] Lord Diplock, *Judicial Control of Government* [1979] 2 MLJ cxl. Second Tun Abdul Razak Memorial Lecture, Kuala Lumpur, June 1979.
[881] Lord Hewart, *The New Despotism* (Ernest Benn Ltd., 1929) p. 23.

The court cannot when exercising its judicial review jurisdiction, subject to the legislative provisions to the contrary, substitute or replace the decision of the public authority with its own. In the context of judicial review of administrative actions in Malaysia, the appellate courts have cautioned against unjustified judicial interference with administrative decisions if this is done with a view of substituting those decisions with some others which the courts may feel fairer or more reasonable on merits. After a finding that a particular decision cannot stand in law, the court will then remit the matter to the authority for reconsideration. The court in the exercise of its judicial review jurisdiction is not to substitute its decision for that of the authority. However there is one qualification: the non-decision substitution feature of judicial review is subject to contrary legislative intention.

Consequential of *Rama Chandran*[1997] 1 AMR 433; [1997] 1 MLJ 145 is that when a decision is attacked on account of unreasonableness or illegality, review jurisdiction extends to merits examination. An examination of merits of a decision followed by finding that no reasonable person or body similarly circumstanced could have come to the conclusion in issue and the making of the decision that ought to have been made in the first place is consistent with the proper exercise of judicial power.

In *Petroliam NasionalBhd v NikRamli bin Nik Hassan*, [2003] 4 CLJ 625 Steve Shim CJ (Sabah & Sarawak) noted that the majority decision in *Rama Chandran*developed the principles that the courts have:

1. the power to review the decision of a tribunal on the merits;
2. the power to substitute a different decision in place of the tribunal's decision without remitting it to the tribunal for a re-adjudication; and
3. the power to order consequential relief.

As mentioned earlier there is an exception to the non-substitution of decision principle. This is derived from a series of decisions, exemplified by that of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia.*[19971 1 AMR 433; [1997] 1 MLJ 145.The substitution is permissible if this is permitted under the relevant legislation. The issue whether a substitution is or is not appropriate in any given case, remains a matter of construction. In this

case the Federal Court was able to determine the sum that would represent a fair compensation that a claimant was entitled to.

In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors*[882] the use the appropriate procedure for use in judicial review has been discussed. The appellant's main contention before the Federal Court was that the procedure under O 53 of the RHC was not a mandatory procedure — a person aggrieved with the decision of a public body could therefore seek relief by way of writ or originating summons.

The Federal Court in dismissing the appeal explains that judicial review provides a means by which judicial control of administrative action is exercised. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in O 53 of the RHC. The stringent conditions imposed by O 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. It should be noted that not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, the appellant's claim was based solely on public law. There was no trace of private law involvement. Neither did the circumstances justify an exception to the general rule. Thus, the appellant's writ was rightly struck off as an abuse of the court's process.

As can be observed above Order 53 must be invoked when the defendant or one of the defendants in the action is the government or a public authority. It has been said that the purpose of Order 53 is "to provide certain protections to the public body or authority when their public act or decision is being challenged".[883] The current Order 53 came into effect on 21 September 2000. It has been said that the new Order 53 was introduced to cure the mischief of its precursor, which was much narrower and more restrictive.[884] In addition, it has also been noted that the creation of Order 53 in the Rules of the High Court 1980 is to provide certain protections to the public body or authority when their public act or decision is being challenged, for example, the

[882][2010] 3 MLJ 145.
[883]See *TR Lampoh AK Dana &Ors v Government of Sarawak* [2005] 6 Malayan Law Journal 371, p. 390.
[884]*SivarasaRasiah v BadanPeguam Malaysia &Anor*[2002] 2 Malayan Law Journal 413.

time limit within which the challenge to the public act or decision must be made.[885] Regardless of the reasons for its introduction, it was observed that there are "stringent mandatory requirements" under the new Order 53.

One such additional requirement, as noted above, is the fact that a plaintiff representing a group of persons seeking judicial review and any form of relief from the court is required to make the application "promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant".[886] Although the court has the discretion to extend the period of 40 days, it can only do so if the court "considers that there is a good reason for doing so".[887] This requirement poses as an obstacle to a potential representative action against the government or any public authority. For instance in *TR Lampoh AK Dana & Ors* v *Government of Sarawak*, a representative action brought by a group of natives alleging that their native customary rights over certain communal native customary lands had been impaired and abridged by the act of the defendant was struck out on the ground that the plaintiffs were out of time.

Besides the limitation period of 40 days, a plaintiff intending to commence a representative action is also required to obtain leave from the court in accordance with the requirement in Order 53 rule 3(1). The application must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.[888] The plaintiff is also required to give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statements and affidavits.[889]

Another barrier faced by potential plaintiffs is the fact that in granting leave, the Judge may impose such terms as to costs and as to the giving of security as he thinks fit.[890] Finally, the

[885] *TR Lampoh AK Dana &Ors*v *Government of Sarawak* [2005] 6 Malayan Law Journal 371, 390.
[886] Order 53 rule 3(6) of the Rules of the High Court 1980.
[887] Order 53 rule 3(6) of the Rules of the High Court 1980.
[888] Order 53 rule 3(2) of the Rules of the High Court 1980.
[889] Order 53 rule 3(3) of the Rules of the High Court 1980.
[890] Order 53 rule 3(4) of the Rules of the High Court 1980.

plaintiffs in the representative action must also be able to demonstrate to the satisfaction of the court that they are "adversely affected by the decision of the public authority".

The Issues facing Constitutional Adjudication in Malaysia

Following the abolition of the final appeal from the Malaysian courts to the Judicial Committee of the Privy Council from 1 January 1985, the Malaysian judiciary had taken a more activist line than previously in constitutional matters. According to the Lord President at the time, Tun Mohamed SallehAbas, the judges, now that they were master of their own household, felt that they had the responsibility to 'chart a new judicial course'.[33] In doing so they recognised that they had to proceed slowly, listening to all the arguments, and having regard to the nature of the country, and to the litigants before them. It does not appear that they had any preconceived philosophy to be implemented, but simply a heightened sense of the importance of their role in a new situation in which they had final authority when it came to legal interpretation. It should be mentioned here that the judiciary had not sought, especially in the years following the*Rukun Negara* amendments (from 1971) to challenge the executive in crucial matters of Government policy. Still less did they have any political agenda. They were indeed accused by lawyers and others of being timid and of not protecting constitutional rights as conceived by the Constitution.

The judicial crisis was sparked off in 1988 when the then Prime Minister Datuk Seri Dr Mahathir Mohamad tabled a Bill in Parliament to amend Articles 121 and 145 of the Federal Constitution. The Bill sought to divest the courts of the "judicial power of the Federation", giving them only such powers as Parliament granted them. The Attorney-General was also empowered to determine venues for cases. TunSallehAbas, who was the Lord President then, made a statement defending the judiciary's autonomy. He also convened a meeting of 20 Supreme Court judges in Kuala Lumpur and a decision was made to address a confidential letter to the Yang di PertuanAgong and various state rulers. The letter read: "All of us are disappointed with the various comments and accusations made by the honourable prime minister against the judiciary, not only outside but within the Parliament."

Two months later, Salleh was suspended and High Court of Malaya Chief Justice Tan Sri Abdul Hamid Omar was appointed acting Lord President. Salleh was brought before a tribunal

for misconduct. In response, he filed a suit in the High Court challenging the constitutionality of the tribunal. Five judges of the Supreme Court convened and granted Salleh an interlocutory (interim) order against the tribunal. This order was later set aside and in August 1988, Salleh was officially removed from the post of Lord President.

The five Supreme Court judges who granted Salleh the interlocutory order – Tan Sri AzmiKamaruddin, Tan Sri EusoffeAbdoolcader, Tan Sri Wan Hamzah Mohamed Salleh, Tan Sri Wan Suleiman PawanTeh and Datuk George Seah – were suspended. In October, Wan Sulaiman and Seah were sacked while the other three judges were reinstated.

If 1988 was an unmitigated disaster for the judiciary, it also heightened awareness of constitutional issues generally and in particular inculcated vigilance in relation to judicial appointments and performance, placing the Bar, which had been strong in defence of the judiciary, firmly in a position of civil-society leadership in relation to these issues. The Bar established a standing committee to monitor the erosion of judicial independence, published a declaration of judicial independence for the benefit of the public, and conducted public talks across the nation to explain the basis of constitutionalism, and how the concept of judicial independence was essential to constitutional democracy.

Eventually The Judicial Appointments Commission (JAC) was established on the 2 February 2009 with the coming into effect of the Judicial Appointments Act 2009 [Act 695]. In accordance with the provision of Act 695, "the main role of the Commission is to uphold/the Commission has been tasked with upholding" the continuous independence of the judiciary through the selection of superior court judges. On the 9 February 2009, the Prime Minister of Malaysia appointed nine (9) Commissioners as provided for under Section 5 of Act 695.

5.Constitutional Adjudication in Indonesia

The discussion below shall elaborate on the establishment and the framework of constitutional adjudication in Indonesian constitutional system. There are some state organs that need to be mentionedinitially in order to comprehend the framework of constitutional adjudication in Indonesia, namely, DPR (House of Representatives), President, and Constitutional Court. The DPR and the President are relevant to be discussed since both organs have authority in the

enactment of laws which can be reviewed by the Constitutional Court. The Supreme Court is also discussed to clarify the different authority of both the Constitutional Court and the Supreme Court in term of judicial review.

5.1 The Main Organs in the Constitutional Framework

5.1.1 The House of Representatives (DPR)

The DPR is a legislative organ which has the authority to enact laws. To enact laws, the DPR has to discuss together with and approved by the President. Besides, there are some functions of the DPR namely 1) legislative function, 2) budgeting function and scrutinizing function[891]. Members of the House of Representatives shall be elected through general elections and the candidates are nominated by a political party. Substantively, structure and function of the Regional House of Representatives (both provincial and district) are the same as the structure and function of the House of Representatives at national level. However, they are different in term of the scope of authority. The House of Representatives has authority at national scope and there are Regional House of Representatives at provincial level and district level.

The House of Representatives is an organ which functions as political representatives because they exercise legislative function. Since the members of the House of Representatives are from political parties, they articulate every issue from political perspective. Through the House of Representatives, people's political interests are accommodated in the daily management of state. The quality of political accommodation lies in the hand of quality of members of the House of Representatives.

In relation to the role of the House of Representatives in law-making, at least there are four roles of the House of Representatives namely (a) propose bills, (b) discuss bills proposed by the President, evaluate the existing laws, and assess the government-policies on executing the bills. The House of Representatives may have significant roles in developing the quality of legislation through these four roles.

[891] Article 20A (1) of the 1945 Constitution of Republic of Indonesia

5.1.2 The President

The President and Vice President shall be in office for a term of five years and may subsequently be re-elected to the same office for one further term only.[892] The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.[893] In exercising his/her duties, the President shall be assisted by a Vice-President.[894]The President shall be entitled to submit bills to the House of Representatives.[895] Besides, the President may issue government regulations as required to implement laws.[896]

5.1.3 The Supreme Court

The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also reexamine cases if new evidence emerges. The Supreme Court has oversight over the high courts (*PengadilanTinggi*) of which there are about 20 throughout Indonesia and district courts (*PengadilanNegeri*) of which there are around 250 with additional district courts being created from time to time.[897] The Supreme Court is the final court of appeal following appeals from the district courts to the high courts. The Supreme Court can also reexamine cases if sufficient new evidence is found.[898]Constitutional matters, however, fall within the jurisdiction of theConstitutional Court of Indonesia, established in 2003.According to the Constitution, candidates for Supreme Court Justices must have integrity and be of good character as well as be

[892]Article 7 of the 1945 Constitution. The limitation for two period of presidency was the result of First Amendment of the 1945 Constitution. The limitation was due to bad history of long period of Soeharto as President. More than 30 years in the presidents had lead Soerharto became a very authoritarian and bureaucratic regime which had violated fundamental rights of citizen through any restrictions, punishment, and corruption.
[893]Article 4 (1) of the 1945 Constitutionof Republic of Indonesia.
[894]Article 4 (2) of the 1945 Constitutionof Republic of Indonesia.
[895]Article 5 (1) of the 1945 Constitutionof Republic of Indonesia.
[896]Article 5 (2) of the 1945 Constitutionof Republic of Indonesia.
[897]In late 2011, the chief justice of the Supreme Court, Harifin A. Tumpa, said that the Indonesian government could only aim to establish district courts in 400 of the nation's 530 provinces, regencies (*kabupaten*) and municipalities (*kotamadya*).
[898]Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition*, Kompas Book Publishing, 2008, at 450.

experienced in law.[899] Candidates are proposed to the House of Representatives by the Judicial Commission. If the House of Representatives approves them, their appointment is then confirmed by the president. As of mid of 2011, there were a total of 804 courts of various kinds in Indonesia.[900] There are about 50 justices sat in the Supreme Court while other high and lower courts across Indonesia employed around 7,000 judges.

Regarding the judicial review, the Supreme Court shall have authority to review legislations lower than the laws such as Government Regulation, Presidential Regulation and Provincial Regulation and Regency/Municipality Regulation.[901] These are 'the judicial review' exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court is also popularized specifically as the 'constitutional review".

5.1.4 The Constitutional Court

The Constitutional Court of Republic of Indonesia is a new state organ in the Indonesia constitutional system as the result of the Third Amendment of the 1945 Constitution.[902] As a constitutional organ, the Constitutional Court of Republic of Indonesia is designed to be the guardian as well as the sole interpreter of the constitution through its decisions.

[899]In practice, other qualifications are required as well. In 2011 the chief justice of the Supreme Court, Judge HarifinTumpa, issued a circular stating that any judges who intended to apply for the position of Supreme Court judge needed to have 20 years experience at the district court level and three years experience at the high court level.
[900]SebastiaanPompe, *The Indonesian Supreme Court: A Study of Institutional Collapse*. Ithaca, NY: Cornell Southeast Asia Program, 2005, at 75.
[901]See Art 7 (1) of Law No. 12 of 2011 on Legislation Making. In this article, it is stated the hierarchy of legislation in Indonesia, as follows:

a. 1945 Constitution (UUD 1945);
b. Decree of People's Consultative Assembly (TAP MPR);
c. Laws/Government Regulation in Lieu-Law (Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang);
d. Government Regulation (Peraturan Pemerintah);
e. Presidential Regulation (Peraturan Presiden);
f. Provincial Regulation (Peraturan Daerah Provinsi);
g. Regency/Municipality Regulation (Peraturan Daerah Kabupaten/Kota).

[902] See Anonim, *Profile of the Constitutional Court of the Republic of Indonesia*, Secretariat-General and Registry Office of the Constitutional Court, 2010, at 2.

5.1.4.1 The History and Development of the Court

The idea to establish Constitutional Court in Indonesia which is separated and equal to the Supreme Court is relatively new. However, the idea to review acts as a mechanism of constitutional adjudication has been debated among the founding fathers of the nation in the preparation of the independence of Indonesia in 1945. Muhammad Yamin was the first founding father who proposed that the Supreme Court had authority to review acts. He further explained that the review could be performed by comparing every product of acts with three systems of norms, namely Constitution, Shariah (Islamic Law) and customary law.[903]Yamin's proposal was not accepted by the member of Independent Committee and Supomo delivered his objection by giving two arguments. Firstly, the 1945 Constitution is formulated not based on *triaspolitica* proposed by Montesquieu. Secondly, the numbers of legal graduates, at the beginning of the independence, were not enough to perform the functions to review acts as delivered by Yamin. Moreover, Supomo further argued that to give authority to the Supreme Court to review acts, it needs a deeper study on Constitutional Court (*Verfassungsgerichtshof*) such as in Austria, Czechoslovakia and Germany with Weimar Constitution. It also takes quite long time to study.[904]

After President Soeharto's resignation in May 1998, Indonesia began to take comprehensive reform measures by putting sovereignty back to the hands of the people. The peak of such efforts was the series of amendments to the 1945 Constitution, made during four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. That series of four amendments produced a blueprint for a system of state administration which was totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution were: (1) the principle of constitutional democracy and (2) the principle of democratic rule of law or "*democratischerechtsstaat*".[905]The democratic system was reinforced by the adoption of various fundamental principles to ensure that sovereignty had its sources in the people and was administered by the people, together with the people, and for the

[903] See JimlyAsshiddiqie, *Pokok-PokokHukum Tata Negara Indonesia*, PT. BhuanaIlmuPopuler, 2007, at 581-582.
[904]Ibid, at 582.
[905]See JimlyAsshiddiqie, Creating A Constitutional Court for A New Democracy, Paper presented at Seminar held by Melbourne Law School, March 11th, 2009, at 2.

sake of the people. Among those important principles were: (i) all universally-applicable instruments of human rights and guarantees of citizens' rights were spelled out in the formulation of the Second Amendment made in 2000, (ii) provisions on the implementation of general elections, based on direct, public, free, confidential, honest, and just principles were included in the Third Amendment in 2001, (iii) the direct presidential election system was set forth in the Third and Fourth Amendments made in 2001-2002, and (iv) ideas were adopted in the Third and Fourth Amendments made in 2001-2002 for the establishment of a constitutional court.[906]

There are some considerations of the establishment of the Constitutional Court[907]. They are as follow:

a. The state of Indonesia shall be a rule of law state which is based on Pancasila and the 1945 Constitution. The state shall aims at achieving a peaceful, order, clean, prosperous and just country;
b. The Constitutional Court as one of the pillars of the judiciary has an important role in upholding the Constitution, principle of rule of law based on its authority as has been stated in the 1945 Constitution;
c. Based on article 24C (6) of the 1945 Constitution, it is needed to arrange the appointment and retirement of justices, court procedure and other regulations regarding the Constitutional Court;
d. Based on the consideration stated in point a, b, c and to conduct article III of Transitional Provision of the 1945 Constitution, it is needed to enact law regarding Constitutional Court.

In exercising of its constitutional duties, the Constitutional Court aims at implementing its vision,"enforcement of the constitution in the context of realizing the goal of rule of law state and democracy for a dignified life as a nation and state". This vision is then manifested into two missions of the Constitutional Court, (1) realizing a modern and accountable Constitutional

[906] Ibid.
[907] See further Constitutional Court Act 2003 and the Amendment of the Constitutional Court Act 2011.

Court as one of the actors exercising judicial power, (2) building Indonesian constitutionality and the culture of constitutional awareness.[908]

Based on article 1 (2) of 1945 Constitution, it is stated that (2) the sovereignty is vested in the people and it will be fully exerted according to the Constitution. In other words, Indonesian political system is a political system that is based on democracy and the Constitution. In short, having this article in the 1945 Constitution, it can be said that after the third amendment of the 1945 Constitution, Indonesia declared as a constitutional democracy state.Following the third amendment of the 1945 Constitution which declared Indonesia as a constitutional democracy state, did the idea of the constitutionality review of a law become adopted in the constitutional norms, and its institutionalization was even established separately named as the Constitutional Court, separately from and equal to the Supreme Court.[909] So, in term of judicial review, the Supreme Court has authority to review regulation under Act based on the hierarchy of ordinance in Indonesia.[910] On the other side, the Constitutional Court has authority to review acts enacted by Parliament and approved by the President.

The amendments inter alia reformed judiciary by establishing two new institutions: Constitutional Court and Judicial Commission. The Court has an equal position to the Supreme Court, but with different jurisdiction[911]. The Constitutional Court has a main function as the organ which has authority to review laws (constitutional review) whether the laws against the Constitution or not.

[908]Ibid, at 9.
[909]JimlyAsshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Review*, Sweet & Maxwell Asia, 2009, at 468.
[910] Based on Act No 12 of 2011on the Legislation Making in Indonesia it is stipulated that there is hierarchy of legislation as follows:
a. 1945 Constitution (*UUD 1945);*
b. Decree of the People's Consultative Assembly (TAP MPR);
c. Laws/Government Regulation in Lieu of Law (UU/PeraturanPemerintah Pengganti UU);
d. Government Regulation (Peraturan Pemerintah);
e. Presidential Regulation (PeraturanPresiden);
f. Provincial Regulation(Peraturan Daerah Provinsi);
g. Regency/Municipality Regulation (PeraturanKabupaten/Kota).
[911]Ibid, at 376.

In the context of constitutional system, the constitutional powers given to the Constitutional Court significantly contribute to the system of checks and balances as argued by Lindsey that the new Constitutional Court has the potential to radically transform the Indonesia judicial and legislative relationship and create a new check on the conduct of lawmakers and the presidency.[912]The role of the Constitutional Court in Indonesia highlights the importance of separation of powers which has been described as "[replacing] the executive-heavy sharing of powers" put in place by the Pre-amendment Constitution. The Constitutional Court's judicial review power provides a check on the Legislature, its impeachment power provides a check on the Executive and its decisions on electoral results help to ensure the integrity of the democratic process.[913]

The Constitutional Court as provided for by the constitutional amendment of 2001 was a compromise position under which there would be an independent court but with circumscribed powers.The court would be able to review primary but not delegated legislation, the power of review over which would remain with the Supreme Court. The significance of this distinction is very great in the Indonesian context. It is because most parliamentary legislation is highly skeletal, whereas delegated legislation provides most of the flesh. In addition, there is no power for the ordinary courts to refer issues of constitutional interpretation to the Constitutional Court. One reason for political forces opposed to an independent court to compromise on their position was that, during the debate on this issue in 2001, President Abdurrahman Wahid was impeached.Fearing a similar and highly politicized impeachment attempt being mounted in future, the new President, Megawati Sukarnoputri, and her PDI -P party decided to support the establishment of the Constitutional Court because of its proposed powers over presidential impeachment. The outcome was a court which has most of the powers one associates with constitutional courts, and actually more than the Korean court, although less than the Thai court under the 2007 Constitution.Although the ordinary courts cannot refer a constitutional issue to the Constitutional Court, it can entertain individual petitions based on constitutional violation,

[912]Ibid, at 378.
[913] Butt, "The Constitutional Courts Decision in the dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?" in McLeod and MacIntyre (eds) *Indonesia: Democracy and the Promise of Governance*, Institute of South East Asian Studies, 2007, 178, at 182.

conduct impeachment proceedings; dissolve political parties, and resolve electoral disputes and disputes between state agencies. With regard to the selection process, this proved to be less controversial than one would have thought, it was being accepted that the 'Korean system' under which three judges are chosen by each branch of the state was fair, workable, and a good compromise. Other features of the Constitutional Court which correspond to the Korean example are the diversion of judicial review of delegated legislation to the Supreme Court, and the process for presidential impeachment. The Constitutional Court is empowered by Article 24C in very general terms, to make the final decision in 'reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general election.It also has power under Article 7B to investigate charges against the President or Vice-President that he or she has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or is otherwise guilty of moral turpitude, or no longer meets the qualifications to serve as President or Vice-President.

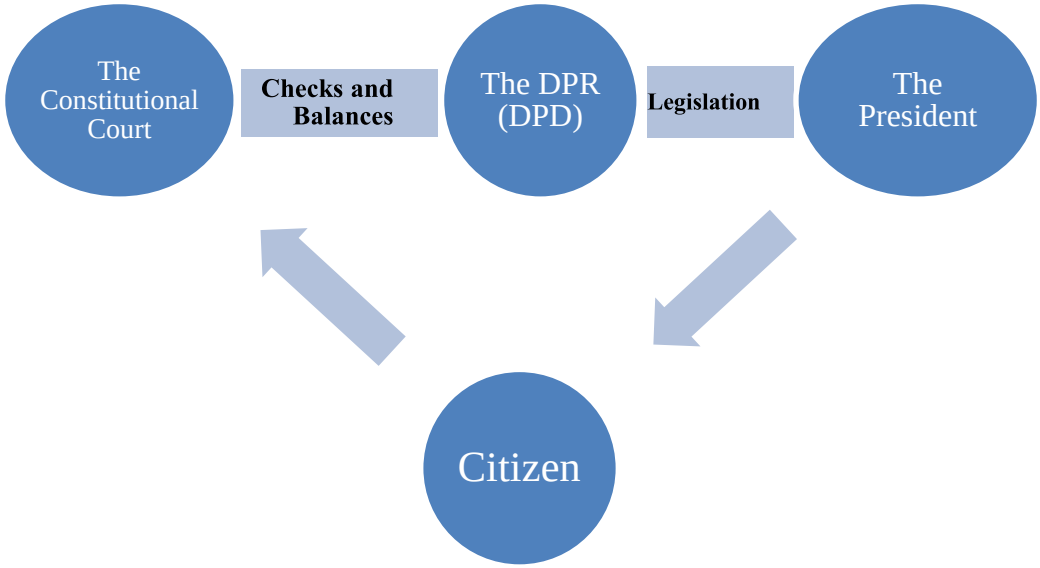
The really striking aspect of the Constitutional Court's performance is that, although its establishment and jurisdiction did not receive multi-lateral or general support, its actual impact has been remarkable. Crucially the Constitutional Court has used the Constitution rather than political or administrative expediency as its touchstone. It struck down a provision in its own organic law that purported to restrict its jurisdiction over legislation to statutes passed after the reform process began in 1999, arguing that this restriction was not apparent in the Constitution itself-thereby at a stroke opening NewOrder (pre-1999) statutes, including colonial era statutes, to scrutiny.[914]

[914] Butt, S,"Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions",(PhD Thesis, University of Melbourne 2006), at 185.

STRUCTURE OF CONSTITUTIONAL ADJUDICATION

Figure 1

Constitutional Adjudication Structure



5.2 TheRole, Powers and Procedure of the Constitutional Court

The Constitutional Court was established as the guardian of the Constitution. As the guardian of the Constitution, the Constitutional Court is the court which has authority to settle any disputes on constitutional cases. The constitutional cases are the cases related to consistency of implementation of constitutional norms. Therefore, the main foundation used by the Constitutional Court deciding on the constitutional cases is the Constitution.[915]

Article 24 paragraph (2) of the 1945 Constitution set forth as follows: Judicial power shall be implemented by a Supreme Court and its subordianate judicatures, in the general judicature, the religious judicature, the military judicature, the state administration judicature, and by a Constitutional Court.Whereas Article 24C which consists of 6 paragraphs stipulates as follows:

[915]See Anonimous, *HukumAcaraMahkamahKonstitusi*, PenerbitSekretariatJenderaldanKepaniteraanMahkamahKonstitusi, 2010, at 13.

a. The Constitutional Court shall have the authority to hear cases at the first and final levels, the decision of which shall be final, in conducting judicial review on laws against the Constitution, in deciding disputes concerning the authorities of state institutions whose authorities provided by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the result of general elections.
b. The Constitutional Court shall be required to pass decisions on the opinion of the House of Representatives concerning alleged violations committed by the President and/or the Vice President in accordance with the Constitution.
c. The Constitutional Court shall consist of nine constitutional court justices as stipulated by the President, comprising three justices proposed by the Supreme Court, three justices proposed by the House of Representatives and three justices proposed by the President.
d. The Chief Justice and the Vice Justice of the Constitutional Court shall be elected from among and by constitutional court justices.
e. Constitutional court justices must possess integrity and flawness personality, must be fair, statesmen mastering the constitution and state organization and shall not concurrently serve as state officials.
f. The appointment and dismissal of the constitutional court justices, the procedural law and other provisions concerning the Constitutional Court shall be regulated by law.

The Constitutional Court is a part of judiciary, independent and equal to the Supreme Court. The establishment of the Constitutional Court has prompted few comments from constitutional law experts. Some put hope on the Constitutional Court as an independent as well as smart in deciding cases.Therefore, there will be good impact on the working of state organs. The existence of the Constitutional Court may also give a big hope for the implementation of state based on the rule of law. So far, there are many abuses of power among state apparatus which at the same time deny the conception of Indonesia as a state based on the rule of law. This new state organ is expected to guarantee the implementation of democracy based on the constitution as becoming the demand of the citizen.[916]

[916]LutuDwiPrastanta, "MahkamahKonstitusidanPrinsip Judicial Independence dalamSengketaAntarLembaga Negara",Vol. IV No. 2(2011) *JurnalKonstitusi*, at 9.

In few years of the establishment of the Constitutional Court, the Constitutional Court was mandated one more authority to decide disputes over the results of local election. This authority was previously handled by the Supreme Court. Based on article 236 C Local Government Acts 2008, it is stated that the authority to decide disputes over the results of local election is moved from the Supreme Court to the Constitutional Court within 18 days after the Act has been enacted.[917]

Benny K Harman (2004)[918] also asserted that the Constitutional Court has given a new fresh air to the political life, democracy and national life of Indonesia. The Constitutional Court functions as a fresh wind for the citizen, particularly in protecting fundamental rights of the citizen from any actions of state which are considered not accordance with the 1945 Constitution. He further explains that the existence of the Constitutional Court has to be warmly welcomed since it is expected that the Constitutional Court may support systematic democracy and political culture. The role of the Constitutional Court is exercised through checks and balances mechanism in constitutional system. This mechanism may also overcome gap between lack of sense of justice in society and the practice of authoritarian regime and the abuse of power in the level of state for long time, more over in Soeharto regime.

Lindsey (2002) argues that if it is effective, the Constitutional Court has potential roles radically to transform relation between the judiciary and legislative organ in Indonesia. This also may give a new mechanism of monitoring on behavior of the members of parliament as well as the president.[919] Accordingly, it is very essential if there is a more comprehensive evaluation on how far the progress of the Constitutional Court after a decade of the establishment of the Constitutional Court is. The evaluation covers a critical analysis on the achievements as well as the obstacles faced by the Constitutional Court. The research recommended relevant proposal to the Constitutional Court for a better role of the Constitutional Court in the future.

[917] BambangSutiyoso, *Tata Cara PenyelesaianSengketa di LingkunganMahkamahKonstitusi*, UII Press, 2009, at 6.
[918] BennyK.Harman,*PerananMahkamahKonstitusidalamReformasiHukum*,daribuku*MenjagaDenyutNadiKonstitusi: Refleksi SatuTahunMahkamahKonstitusi*, Konstitusi Press, 2004, at 39
[919] See also Butt, Simon and Tim Lindsey edited by John Gillespie & Randall Peerenboom, *The People's Prosperity? Indonesian Constitutional Interpretation, Economic Reform, and Globalization*, 2009, Regulation in Asia-Pushing Back on Globalization, London and New York: Routledge, see also Hazama, Constitutional Review and Democratic Consolidation: A Literature Review, Paper presented at IDE Discussion Paper, Japan, 2009.

Judicial process is a mechanism to perceive substantive justice. To pursue the justice needs particular procedures. There is no justice without fair procedures. Therefore, a judicial process needs also series procedure where the people may access the justice.

The procedures of the Constitutional Court also have salient characteristic which are different from other courts. The main characteristic of the court procedures lies in the main legal bases of the court procedure used in the legal procedure is the Constitution: the 1945 Constitution. Even though there are some acts and regulation of the Constitutional Court as the legal bases of the procedure, the acts and regulation can be used as long as it does not contradict to the 1945 Constitution. This is because the characteristic of the Constitutional Courtessentially is to decide constitutional cases.[920]The Constitutional Court performs the hearing process to hear cases filed by the petitioners. There are three kinds of hearings in the Constitutional Court, namely panel hearing, consultative meeting of justices (RPH), and plenary hearing.[921]Panel hearing is a meeting attended by 3 (three) constitutional court justices assigned to hold a hearing for preliminary examination. This hearing is held to examine the legal standing of the petitioner and the substance of the petition. Constitutional court justices may give advice for revision of the petition.[922]

Consultative Meeting of Justices (RPH) is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. In this meeting the case is discussed in deeply and in detail and the decision of the Constitutional Court is made. This meeting must be attended by at least seven constitutional court justices. During the RPH, the Registrar takes notes and records every subject matter of discussion and the conclusion.[923]

A plenary hearing is held by the panel of the constitutional court justices with minimum standard of attendance of 7 (seven) constitutional court justices. This hearing is open for the public with agenda of hearing examination and pronouncement of the decision. Hearing

[920]Ibid, at 28.
[921]Anonimous, *The Profile of the Constitutional Court of the Republic of Indonesia*, Secretariat General and Registry Office of the Constitutional Court, 2011, at 16.
[922] Ibid.
[923] Ibid.

examination includes hearing the petitioner's statement, expert's statement, witness' statement, and statements of the related parties, as well as examining the evidence.[924]

5.3 The Issues facing Constitutional Adjudication in Indonesia

After a decade, some constitutional law experts conclude that there are some problems facing the constitutional adjudication in Indonesia. Firstly, as a new state organs, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. For instance, in case of judicil review of Judicial Commission Act in 2006, the Constitutional Court had nullified the authority of the Judicial Commission to supervise the Constitutional Court Judges. This is a kind of breach of principle of impartiality where the judges may not judge their own interest. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lies in the hands of judges of the Constitutional Court.One of the result of this situation was in 2014, Akil Mochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

Secondly, the function of constitutional adjudication in the Constitutional Court has disturbed by incorporating local election disputes become a part of the authority of the Constitutional Court. The Constitutional Court has the authority to settle local election disputes since Election Act No. 22 of 2007 and Amendment of Local Government Act No. 12 of 2008, state that local election is a part of the general election. However, article 22E of 1945 Constitution states that: "the general election shall be conducted to elect the members of the House of Representative, the Regional Representative Council, the President-Vice President, and the Regional House of Representatives".

There is a contradiction between Election Acts and article 22E of 1945 Constitution whether the local election is a part of the general election regime or it is a part of the local government regime. Aidil Fitriciada argues that the Constitutional Court basically has no

[924] Ibid, at 16-17.

authority to settle the local election disputes because the local election disputes are part of general election regime as stated in article 22 E of 1945 Constitution[925].

Thirdly, after a decade of the existence of the Constitutional Court, there is an evaluation on the scope of the authority of the Constitutional Court whether the Constitutional Court has to have authority in settling disputes over the result of the local election or the scope of authority added by incorporating the authority to decide on constitutional complaints.

Fourthly, in term of disputes on jurisdiction among the state organs, the Constitutional Court hadn't given a significant role in functioning as mechanism of constitutional adjudication due to two reasons, first, unclear concept of subjectum litis of the petitioners to have legal standing in the Court. Second, lack of understanding of the subject matter jurisdiction (objectum litis) of the Court.

6. Constitutional Adjudication: A Comparison between Malaysia and Indonesia

Based onthe previous description of both countries on constitutional adjuducation, it may discuss some similarities and differences as follows:

6.1. Similarities

First, the constitutional adjudication in both countries is a part of realizing the goal of the rule of law state and democracy.[926] In a country based on the rule of law and democracy, there is no authority or organs higher than the Constitution. The authorrity and organs are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state for striving a dignified life of the nations. The existenc of the constitutional adjudication is also a part of fundamental rights of citizen.

[925]Interviewed with Dr. Aidil Fitriciada, on 12 November 2012

[926]Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution of Indonesia were:(1) the principle of constitutional democracy, and (2) the principle of democratic rule of law or "*democratischerechtsstaat*". See Further JimlyAsshiddiqie, Creating A Constitutional Court for A New Democracy, Paper presented at Seminar held by Melbourne Law School, March 11th, 2009, at 2.

Second, exercising of judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. This mechanism also prevents the trend of abuse of powers among the state organs.

From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case.[927] This is the impact of the emergence of idea of constitutional democracy where the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts in the light of the spirit of the constitution as the highest law.

6.2. Differences

However, both countries have differences in some ways. First, both countries follow different model of constitutional adjudication. Malaysia follows the common law model[928]with functions the superior courts as organs of the constitutional adjudication, while Indonesia follows kelsenian models[929] by establishing a new court, namely the Constitutional Court.American model is usually called also as John Marshall's doctrine. According to this doctrine, judicial review is conducted on every case relating to constitutional issues by all ordinary courts through

[927] See Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, 1989,at 127.

[928]This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review.Although in case of Malaysia, it limits the authority of judicial review to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See furhter Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, 1989, at 89.

[929]Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the "American" model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See further Victor FerneresComella, "The European Model of Constitutional Review of Legislation: Toward Decentralisation?", 2004, Volume 2, issues 3, the *International Journal of Constitutional Law, at*461.

a decentralized or diffuse or dispersed review.[930] This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review.[931] In other words, in this model of constitutional adjudication, the review is not separate but includes in other cases that are ongoing process in every level of court. Therefore, all levels of courts have the power of judicial review.

On the other hand, kelsenian model is also called as European model. Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the "American" model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies.[932] This model is also different from American that has a diffuse system. The Continental model is the concentrated system of judicial review.

The concentrated system of judicial review is characterized by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organized outside the ordinary judicial hierarchy.[933]

The centralized model of constitutional review was born in Europe after World War I. Austria and Czechoslovakia in 1920, Liechtenstein in 1921, and Spain in 1931, were the first countries to adopt it. Hans Kelsen was the scholar who did the most to develop and popularize this model and defend it against the American alternative. After World War II, the centralized model expanded

[930]Ibid, at 47. See also Richard H. Falllon, Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law*, Cambridge University Press, 2004, at 13. In this book, Fallon states that Marshall gave the ruling for which Marbury is famous: It would defeat the purpose of a written constitution if the courts had to enforce unconstitutional statues. The courts must exercise judicial review because the Constitution is law, and it is the essence of the judicial function "to say what the law is."

[931] See Allan R. Brewer-Carias, n. 78, at 91.

[932]Victor FerneresComella, "The European Model of Constitutional Review of Legislation: Toward Decentralisation?" 2004, Volume 2, Issues 3, the *International Journal of Constitutional Law, at* 461.

[933] Allan R. Brewer-Carias, n. 136,at185.

to other countries. Today it is the prevailing model in Europe, particularly among the member states of the European Union.[934]

Continental model has adopted by numerous countries all over the world. Off course, each country also modifies this model into various formulas. Some general features of continental model can be summarized as follows:

a. Constitutional review is implemented variously depending on the system in each country.
b. Constitutional review is exercised by an independent organ.
c. In case of constitutional complaint cases, they settle the case by separating the mechanism from ordinary courts.
d. The constitutional position of the constitutional court is guaranteed through independent administration and budgeting.
e. The constitutional court has monopolistic authority in exercising the constitutional review.
f. There judiciary has power to nullify the legislative acts.
g. The constitutional court judges are usually elected by bodies of political power.
h. The nature of decision made by the constitutional court is legal as well as political, although the constitutional court may have a purely consultative function.
i. The continental model of constitutional adjudication is generally repressive in nature, although in a small numbers, preventive review is also implemented in practice.[935]

Second, as the consequence of the models, Malaysia has an appel mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralized model, has no appeal mechanism because the Constitutional Court's decision is first and final.

[934]Victor FerneresComella, the European Model of Constitutional Review of Legislation: Toward Decentralisation?2004, Volume 2, Issues 3, the *International Journal of Constitutional Law, at* 471.
[935]JimlyAsshiddiqie,*Model-Model PengujianKonstitusional di Berbagai Negara*, KonstitusiPress, 2006,at 54-55.

7. Conclusion

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realizing the goal of the rule of law state and democracy. The courts have the objectives of striving for a dignified life of the nations, and perform as actors of exercising judicial review as mechanism of constitutional adjudication. The constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. However, both countries follow different model of constitutional adjudication. Malaysia follows the common law model which functions the superiorcourts as an organ of the constitutional adjudication, while Indonesia follows kelsenian models by establishing a new court, namely the Constitutional Court. This paper intends to observe the establishment, role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy, but also influenced the process of democratic consolidation in the region.